80-840

Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

GARRY WEBER, ET AL.,

Petitioners,

v.

BENNY B. BARRETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT

LAW OFFICES OF EARL LUNA
EARL LUNA
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

Attorney for Petitioners

QUESTION PRESENTED FOR REVIEW

WHETHER ONE MAY RECOVER ATTORNEY'S FEES ON APPEAL UNDER 42 U.S.C. § 1988 AGAINST PETITIONERS WHO WERE NEVER PARTIES TO THE CIVIL RIGHTS SUIT BUT UNSUCCESSFULLY ATTEMPTED TO INTERVENE.

INDEX

	Page
Opinions Below	2
Grounds for Jurisdiction	2
Question Presented for Review	2
Statute Involved	3
Statement of the Case	3
Reason for Granting Writ	4
Conclusion	7
Certificate of Service	8
Appendix	
Statute Involved	A-1
Unpublished Opinion of the Court of Appeals Allowing Attorney fees on Appeal of the Denial of Intervention; Order of the Court of Appeals Denying Rehearing En Banc	B-5
Order of Single Judge of Court of Appeals Granting Attorney's Fees on Appeal; Order of the Court of Appeals Setting Aside Order of Single Judge	C-2
Unpublished Opinion of the Court of Appeals Affirming the Denial of Intervention	D-3
Order of the District Court Denying Intervention	E-4

TABLE OF AUTHORITIES

CASES

	Page
Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1979)	6
Criterion Club of Albany v. Board of Commissioners, 594 F.2d 118 (5th Cir. 1979)	6
Hanrahan v. Hampton, 48 LW 3780, 100 S.Ct. 1987 (1980)	5
Iranian Students Ass'n v. Edwards, 604 F.2d 352 (5th Cir. 1979)	6

Statutes

28 U.S.C. § 1254(1)	3
42 U.S.C. § 1988	3, 4, 5, 6

In The

Supreme Court of the United States

OCTOBER TERM, 198.

No. .....

GARRY WEBER, ET AL.,

Petitioners,

v.

BENNY B. BARRETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on July 17, 1980.

---

[1]The Petitioners are Dallas County, County Judge Garry Weber, County Commissioner Jim Jackson, County Commissioner Nancy Judy, County Commissioner Jim Tyson, and County Commissioner Roy Orr, comprising the Commissioners Court of Dallas County, the governing body of Dallas County, Texas. The Respondent is Benny B. Barrett, a former deputy sheriff of Dallas County.

OPINIONS BELOW

A copy of the unpublished opinion of the United States Court of Appeals for the Fifth Circuit is attached hereto in Appendix B allowing Respondent attorney fees on appeal of the denial of intervention. Also attached in Appendix B is a copy of the Fifth Circuit's Order denying a rehearing en banc.

A copy of an Order of a single judge of the Fifth Circuit filed May 12, 1980, granting attorney's fees on appeal and copy of the Fifth Circuit Order filed June 19, 1980, setting aside the May 12, 1980, Order of the single judge are attached hereto in Appendix C.

A copy of the unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of intervention by the United States District Court for the Northern District of Texas is attached hereto in Appendix D.

A copy of the United States District Court's Order denying Petitioners' intervention is attached hereto in Appendix E.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on July 17, 1980, and Petitioners' Motion for Rehearing En Banc was denied September 5, 1980. This petition for certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

WHETHER ONE MAY RECOVER ATTORNEY'S FEES ON APPEAL UNDER 42 U.S.C. § 1988 AGAINST PETITIONERS WHO WERE NEVER PARTIES TO

THE CIVIL RIGHTS SUIT BUT UNSUCCESSFULLY ATTEMPTED TO INTERVENE.

STATUTES INVOLVED

42 U.S.C. § 1988.

This statute is set forth in Appendix A.

STATEMENT OF THE CASE

Benny B. Barrett, Respondent, filed a 42 U.S.C. § 1983 civil rights suit against Carl Thomas in the United States District Court for the Northern District of Texas, claiming that Carl Thomas, Sheriff of Dallas County, Texas, fired him for political reasons. Respondent not only did not sue Petitioners in the civil rights case, he successfully opposed their attempted intervention in the civil rights suit he had filed against Thomas.

Petitioners appealed the denial of intervention to the United States Court of Appeals for the Fifth Circuit. That Court affirmed the District Court judgment denying intervention. (Appendix D).

Respondent filed a motion for attorney fees on appeal, based on his being the "prevailing party on appeal", even though Respondent had not sued Petitioners in the civil rights case and successfully opposed their attempted intervention as parties in said suit.

On May 12, 1980, a single Judge granted the motion for attorney's fees and remanded same to the trial court to determine the amount of the fees. (Appendix C). Upon motion of Petitioners, the Order of May 12, 1980, was set aside on the ground that it was a matter properly to be considered by the entire panel. (Appendix C).

A Panel for the United States Court of Appeals for the Fifth Circuit granted said motion and remanded the cause

to the trial court to determine the amount of attorney's fees. (Appendix B).

Petitioners filed a motion for a rehearing en banc and same was denied on September 5, 1980. (Appendix B).

42 U.S.C. §1988 provides in the final sentence that:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title .... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs."

The Fifth Circuit noted that Respondent was "a clear and undisputed winner" on appeal and that Petitioners were "not prevailing parties" under 42 U.S.C. § 1983. Since, therefore, Respondent prevailed on his underlying claim against Thomas and part of this attorney's time was spent in preventing the judgment against Thomas from being derailed as a result of the attempts to intervene, Petitioners cannot be " . . . excused from the burden of these costs simply because we did not hold they were liable for the judgment on the merits against Sheriff Thomas, an issue never raised or considered by the trial court."

The Court allowed the attorney fees to the winner of an appeal from the denial of an intervention even though the "clear and undisputed winner" has never prevailed on the merits of any Civil Rights claim against the Petitioners. The results of the Fifth Circuit action is to permit one to recover attorney fees under 42 U.S.C. § 1988 from those who were not sued under either section 1981, 1982, 1983, 1985 or 1986 of 42 U.S.C.

REASON FOR GRANTING WRIT

The Court should grant a review on writ of certiorari of the judgment of the United States Court of Appeals for

the Fifth Circuit because that decision is in conflict with the decision of this Court construing the terms of a Federal statute.

Direct Conflict With a Decision of This Court Construing A Federal Statute.

The decision of the Court of Appeals for the Fifth Circuit in this case conflicts with the per curiam decision of this Court in *Hanrahan v. Hampton*, 48 LW 3780, 100 S.Ct. 1987 (1980), construing 42 U.S.C. § 1988, as well as the cases cited therein.

The usual rule in this country that each party is to bear the expense of his own attorney is departed from by 42 U.S.C. § 1988. Where a prevailing plaintiff is awarded attorney's fees under this statute, we are dealing with circumstances where fees are awarded against a violator of federal law. Petitioners not only were not found to be violators of federal law, the Plaintiff (Respondent) did not even make a claim against them. Therefore, it could hardly be said that Respondent prevailed on the merits of a civil rights claim against Petitioners. Respondent did prevail in the Fifth Circuit appeal affirming the District Court's refusal to permit Petitioners to intervene.

This Court made it clear in *Hanrahan v. Hampton*, 48 LW 3780, 100 S.Ct. 1987 (1980), that 42 U.S.C. §1988, by its terms, permits an award of attorney fees only to a "prevailing party" and that the Court of Appeals was authorized to award respondents the attorney's fees attributable to their appeal only if by reason of obtaining a partial reversal of the trial court's judgment, they prevailed within the meaning of § 1988. The Appeals Court, therefore, could only award attorney's fees to Respondent Barrett if by obtaining an affirmance of the trial court's judgment denying Petitioners attempted intervention, he prevailed within the

meaning of § 1988. The Court concluded in *Hanrahan*, supra, that while respondents did prevail on matters in the sense that the Court of Appeals overturned several rulings against them by the District Court, they were not prevailing parties in the sense intended by 42 U.S.C. § 1988, as amended. Respondent Barrett prevailed in the sense that the District Court judgment denying the intervention was affirmed. As the Circuit Court put it:

> "On the issue before us on appeal, there was a clear and undisputed winner: the appellee."

But he was not a "prevailing party" in the sense intended by 42 U.S.C. § 1988. The Respondent did not make a civil rights claim against Petitioners and did not want them in the civil rights suit he had filed against Carl Thomas. In *Hanrahan*, supra, the respondents had not prevailed on the merits of any of their civil rights claims, the favorable rulings in the Court of Appeals were not matters on which a party could "prevail" for the purposes of shifting his counsel fees to the opposing party under § 1988.

Respondent Barrett and the Circuit Court erroneously took the position that since he had prevailed against one party (Thomas), he was entitled to an award of attorney fees against Petitioners since their intervention, if successful, could have damaged or "derailed" his judgment against Thomas.

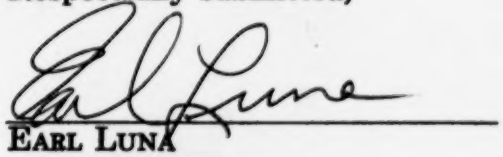
The Circuit Court cited *Iranian Students Ass'n v. Edwards*, 604 F.2d 352 (5th Cir. 1979); *Criterion Club of Albany v. Board of Commissioners*, 594 F.2d 118 (5th Cir. 1979); and *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977) as authority for allowing the attorney fees. An examination of those cases reveals that neither of them involved facts where there was no prevailing party on the merits of a civil

rights claim as existed in *Hanrahan*, supra, and the case at bar. Although Petitioners relied on *Hanrahan*, supra, the Circuit Court failed to cite it in the opinion. Recognizing that attorney fees are not allowed "where the procedural issue is merely a question raised on the way to the main issue" and further recognizing that this appeal was a procedural one, the right to intervene, the Court observed that "If the Appellants had prevailed on appeal, Barrett's substantive judgment would have been imperiled. The outcome on appeal was not interlocutory interpretation but a final judgment on the question presented." Yet, it did not constitute a final judgment where Respondent recovered on the merits of a civil rights claim against Petitioners.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



EARL LUNA
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

Attorney for Petitioners

PROOF OF SERVICE

STATE OF TEXAS
COUNTY OF DALLAS

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for petitioners herein in all proceedings had in the Courts below.

I further state upon oath that upon the 20th day of November, 1980, I served copies of the foregoing Petition for Writ of Certiorari on the Respondent, Benny B. Barrett, by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated to-wit: Mr. James C. Barber, 318 Merchants State Bank Building, 5217 Ross Avenue, Dallas, Texas 75206.

Earl Luna

SUBSCRIBED AND SWORN TO before me by the said EARL LUNA, this the 20th day of November, 1980.

Notary Public,
Dallas County, Texas

APPENDIX

APPENDIX A

42 U.S.C. § 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

B-1

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. S79-2183

BENNY B. BARRETT,

Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff,

Defendant-Appellee,

COUNTY JUDGE GARRY WEBER,

ET AL.,

Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON MOTION FOR ATTORNEY'S FEES

Before GEE, RUBIN AND POLITZ, Circuit Judges.

RUBIN, Circuit Judge.

The issue on appeal was whether the trial court had erred in denying appellants the right to intervene. This court affirmed the trial court's decision. The appellee is clearly the prevailing party. The appellants develop an interesting and complicated syllogism: the opinion makes it clear that there was no need for the intervention, hence the intervenor is protected; therefore, the intervenor prevailed. The argument rests on an erroneous premise: that victory is to be determined esoterically on the basis of whether the ultimate effect of a decision is subjectively pleasing to the litigant. We must proceed on a more pragmatic basis: we look to the issues

presented and consider whether the party who presented them prevailed in whole or in part. On the issue before us on appeal, there was a clear and undisputed winner: the appellee. The mere fact that appellants have been comforted to some degree by learning that they will not be made liable without first being given an opportunity to defend themselves does not make them "prevailing parties" under 42 U.S.C. § 1988.

Appellee has prevailed on his underlying claim against defendant Sheriff Thomas. Part of the cost involved in so prevailing was the devotion of his attorney's time and effort in successfully preventing the initial judgment against Thomas from being derailed as a result of appellants' attempts to intervene. Appellants cannot now be excused from bearing the burden of these costs simply because we did not hold they were liable for the judgment on the merits against Sheriff Thomas, an issue never raised or considered by the trial court.

Appellants have argued that the effect of the trial court's denial of intervention was that "they (appellants) never became parties to the proceedings." It is correct that, in Weiser v. White, 505 F.2d 912, 918 (5th Cir.), *cert. denied*, 421 U.S. 993, 95 S.Ct. 1998, 44 L.Ed.2d 482 (1975), we refused to assess costs because we never had the jurisdiction necessary to order the payment of attorney's fees. However, that case involved an attempt to appeal two separate orders of a *three-judge court* denying intervention and denying attorney's fees. Exclusive jurisdiction lay in the Supreme Court and we, therefore, lacked jurisdiction to hear the appeals. 505 F.2d at 918. Here appellants sought to have this court, which clearly had jurisdiction over their appeal, declare that they had a right to intervene. The relief they sought was unequivocally denied. The appellants were properly before this court for the purpose of pursuing their appeal, and are properly before us for purposes of determining their liability for attorney's fees generated by the appeal.

In Iranian Students Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979), we stated:

> It is well settled that a plaintiff prevailing in actions subject to 42 U.S.C. § 1988 is ordinarily entitled to attorney's fees unless special circumstances exist to render such an award unjust.

See also Criterion Club of Albany v. Bd. of Commissioners, 594 F.2d 118, 120 (5th Cir. 1979); Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977).

Appellants also urge that the attorney's fees are not usually due for a procedural victory but only for substantive triumph. Where the procedural issue is merely a question raised on the way to the main event, the proposition is correct. Here, however, the question raised was a procedural one: the alleged right to intervene. If the appellants had prevailed on appeal, Barrett's substantive judgment would have been imperilled. The outcome on appeal was not an interlocutory interpretation but a final judgment on the question presented. For these reasons, the appellee will be allowed costs and, as an item of costs, attorney's fees for defending this appeal. While we have the authority to set attorney's fees, Knighton v. Watkins, 616 F.2d 795, 801 (5th Cir. 1980), we think it better, under the circumstances, to make it possible for an evidentiary hearing to be held. Therefore, the case is remanded to the district court for such proceedings as may be necessary to determine the amount of the fees and other appropriate items in accordance with the standards in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

B-4

In The

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 79-2183

BENNY B. BARRETT,
Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff,
Defendant-Appellee,

COUNTY JUDGE GARRY WEBER,
ET AL.,
Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 7-17-80, 5 Cir., 197...., ...F.2d.....).

(September 5, 1980)

Before GEE, RUBIN AND POLITZ, Circuit Judges.
PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the mem-

bers of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Form 704-2

C-1

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. S79-2183

BENNY B. BARRETT,

Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff

Defendant-Appellee,

COUNTY JUDGE GARRY WEBER,
ET AL.,

Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

---

ORDER:

IT IS ORDERED that the motion of appellees for award of attorney's fees is GRANTED. The case is remanded to the District Court for such proceedings as may be necessary to determine the amount of the fees and other appropriate items in accordance with the standards in Johnson v. Georgia Highway Express, Inc. 488 F2d 714 (5th Cir. 1974).

/s/ ALVIN B. RUBIN
United States Circuit Judge

C-2

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. S79-2183

BENNY B. BARRETT,

Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff

Defendant-Appellee,

COUNTY JUDGE GARRY WEBER, ET AL.,

Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ORDER:

IT IS ORDERED that the order of the court filed May 12, 1980, granting the motion of appellees for award of attorneys' fees, is hereby set aside. The matter appears properly to be one for consideration by the entire panel.

Should the mover desire to file any further memorandum, the memorandum of authorities in support of the motion shall be filed within ten days, that is, by June 18, 1980. Opponents of the motion are allowed ten additional days, until June 28, 1980, within which to reply.

United States Circuit Judge

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-2183

Summary Calendar*

BENNY B. BARRETT,

Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff

Defendant-Appellee,

COUNTY JUDGE GARRY WEBER, ET AL.,

Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

(April 11, 1980)

Before GEE, RUBIN AND POLITZ, Circuit Judges.

PER CURIAM:

A former employee of the Sheriff of Dallas County, Texas, acting as representative of persons then or previously employed by the Sheriff, brought suit to enjoin the enforcement of certain of the Sheriff's rules on the ground that these unconstitutionally impaired his Fourteenth and First Amendment rights, to gain reinstatement and to recover back pay. After a jury trial concerning the discharge and back pay issues and the entry of an interim judgment of liability against the Sheriff, but before the district judge had entered a final judgment, the Dallas County Commissioner and the County Judge sought to intervene because county funds might be liable for a judgment against the Sheriff. They

*Fed. R. App. P. 34(a); 5th Cir. R. 18.

sought a declaration that the County is not liable. The trial court denied the motion to intervene on the triple grounds that it was untimely, that the Sheriff adequately represented their interest and that the parties would be prejudiced by belated intervention. Finding that the trial judge did not abuse his discretion, we affirm.

Any intervention, whether permissive or of right, must be asserted by "timely application." Fed. R. Civ. P. 24(a),(b). Timeliness is not measured by a judicial stop watch or by a pleadings gauge; its determination rests on the sound discretion of the trial judge. NAACP v. New York, 413 U.S. 345, 93 S.Ct. 2591, ... L.Ed.2d ..... (1973); Stallworth v. Montsanto Co., 558 F.2d 257, 263 (5th Cir. 1977); United States v. United States Steel Corp., 548 F.2d 1232, 1235 (5th Cir. 1977); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1133 (5th Cir. 1970); C. Wright & A. Miller, Federal Practice and Procedure § 1916 (1972). That discretion turns in large measure on the length of time during which the proposed intervenor knew of the suit and its possible effect on him and the prejudice to other parties that would ensue from granting the motion at that stage of the litigation. Stallworth v. Montsanto Co., 558 F.2d 257, 264-65 (5th Cir. 1977); United States v. United States Steel Corp., 548 F.2d 1232, 1236 (5th Cir. 1977); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1125 (5th Cir. 1970); *see* NAACP v. New York, 413 U.S. 345, 366-70, 93 S.Ct. 2591, 2603-04, ... L.Ed.2d ....., ... (1973). The trial judge should also consider prejudice to the would-be intervenor from being denied intervention and the existence of "unusual circumstances" militating for or against a finding of timeliness. Stallworth v. Montsanto Co., 558 F.2d 257, 265-66 (5th Cir. 1977).

The suit had been pending more than two years and had been tried on the merits when the motion was filed. The trial judge found that the County Commissioners knew of the suit and had ample opportunity to intervene earlier. The Commissioners do not deny this; they instead assert that only after money judgment was imminent did they realize that the plantiffs might seek to collect from county funds.

The failure subjectively to appreciate the perils posed by a suit cannot excuse delay. To permit intervention while the trial court was deliberating on a judgment, after all proceedings in the case had been completed, would have injected new issues and required new briefs, new argument and, perhaps, additional evidence. There was ample support for the judge's decision that the parties would suffer substantial prejudice and appreciable delay.

There is no irreparable prejudice to the County Commissioners. Judgment was entered against the Sheriff alone. It expressly states that it "draws no conclusions concerning the liability, if any, of the County of Dallas, Texas, for complying with the provisions of the judgment." If execution on the judgment is levied on county funds, the County may then oppose it.

Accordingly, the judgment is AFFIRMED.

E-1

In The

United States District Court

for the Northern District of Texas

Dallas Division

Cause No. CA3-77-1501-F

BENNY B. BARRETT,

versus

CARL THOMAS, Sheriff

ORDER DENYING INTERVENTION

Garry Weber, County Judge of Dallas County, and County Commissioners Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr have filed a motion to intervene in this lawsuit, and for leave to file a Cross Claim against Defendant Carl Thomas. These proposed intervenors also seek to bring in an additional party, Fidelity & Deposit Co. of Maryland, the surety on Carl Thomas' bond.

The proposed intervenors argue that they are concerned that any judgment by Barrett and the class against Carl Thomas may have to be paid from the county treasury, and such payment would impair the Commissioners' ability to see that Dallas County funds are paid as budgeted. They allege in their brief that they have the right to intervene under Federal Rule of Civil Procedure 24(a) because any judgment in this case will impair or impede their ability to protect a claimed interest in county property.

The motion to intervene, the Commissioners contend, is timely because Barrett has been denied relief and the claims of the unnamed class members have not been decided by the Court. Thomas is allegedly not protecting the County's

interests in the lawsuit; in fact, the Commissioners allege that his interests could be adverse to the county if the court determines that Thomas is liable in some manner for a judgment in this case.

Timeliness of the Motion

A motion to intervene must be timely filed. *FMC Corp. v. Keizer Equipment Co.*, 433 F2d 654 (6th Cir. 1970). When examining a motion to intervene, a Court must consider whether or not the applicant was in a position to seek intervention at an earlier stage in the case. *FMC, supra; see Iowa State University Research Foundation Inc. v. Honeywell, Inc.* 459 F.2d 447 (8th Cir. 1972).

In this case the Commissioners have filed a motion to intervene after trial on the liability issues in the lawsuit, and one week prior to the Court's scheduled hearing on the issue of damages. The lawsuit was filed in 1977, two years ago; one year ago this Court entered a preliminary injunction enjoining the Sheriff from enforcing certain rules and regulations. No motion to intervene was filed during this two year period; instead, the Commissioners waited until the eve of judgment to assert their claims, apparently when they awoke to face the possibility that they, rather than Carl Thomas, might ultimately be responsible for paying any judgment imposed in this case. The Commissioners have had ample opportunity at earlier stages of this proceeding to intervene; at present their motion is untimely.

Commissioners cite one case for authority that they have asserted a timely motion to intervene, *United Airlines v. McDonald Douglas*, 53 L.Ed. 2d 423 (1977). In that case applicants to intervene were putative class members who sought to intervene *for the limited purpose* of appealing the denial of class certification. The District Court refused to certify denial of class certification for interlocutory appeal, and therefore no appeal could be taken until after a final judgment was entered by the Court. *Promptly* after final judgment was entered the putative class members sought to intervene to appeal.

The Supreme Court emphasized in permitting the intervention that the *proper time* to intervene *in that case* was after entry of final judgment; to seek to intervene earlier would have meant that the putative class members would have been spectators to the proceedings until the entry of final judgment.

In this case, however, the Commissioners could have intervened two years ago and would not have been spectators to the proceedings; the issues they seek to raise now could have been argued to the Court, and decided along with the rest of the lawsuit. Now, on the eve of the Court's entry of final judgment, to permit the intervention would mean postponement of the April 2, 1979 hearing, postponement of the entry of judgment, and injection of a new controversy into the lawsuit.

Right to Intervene

The Commissioners appear to be under the false impression that this Court, without the participation of the Commissioners in this lawsuit, will be deciding in its final judgment whether the County of Dallas and the Dallas County Commissioners are liable for any judgment against Carl Thomas in this case. That issue is not now before the Court, and has never been raised in this case until the Commissioners filed their petition in intervention. The Court, as indicated in its memorandum order, will enter judgment against the Defendant in this case, Carl Thomas, and not against the Commissioners. If Carl Thomas believes, or the Plaintiffs believe, that the Commissioners, or Dallas County, or the Fidelity & Deposit Co. of Maryland is liable for the judgment against Thomas, they are free to request payment and, if denied, file a lawsuit to collect the money they feel is owed to them by those, or any other, entities. Thus, contrary to the Commissioners' assertions, this Court's judgment will not impede or impair the Commissioners' ability to protect any interest they have in this lawsuit.

Adequacy of Thomas's Representation

Where the interest of the intervenor is identical with that of a party, it is presumed that the party will adequately protect the intervenor. *Penick v. Columbus Educational Association*, 574 F.2d 889 (6th Cir. 1978). The interests of the Commissioners and the Sheriff are identical in this lawsuit, with the possible exception that there may be some conflict as to who should pay any judgment. Any dispute about who should pay the judgment should be and can be resolved between the Sheriff and the Commissioners' Court, and should not become, at this late stage, a new issue in this nearly completed case.

Permissive Intervention

Timeliness is required for a petition in intervention under Rule 24(b) and, as discussed earlier, the Commissioners' motion is not timely. There are also no common questions of law or fact; the issues currently before the Court involve the amount of damages to be assessed, and the issues in the original lawsuit involved whether or not the Sheriff took illegal politically-motivated action against the class. Commissioners do not seek to raise these issues.

Finally, substantial prejudice would occur if the intervention were permitted because the class remedy hearing, which has been set for nearly two months, would have to be postponed, causing considerable delay in this case at a time when the case is nearly concluded.

For the reasons stated, the motion of the Commissioners to intervene is denied.

IT IS SO ORDERED.

United States District Judge

March 29, 1979